Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN K. ELLIS,

Petitioner,

v.

ROBERT B. METZ,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN K. ELLIS
5431 Morning Star Drive
Reno, Nevada 89523
(775) 746-3637
In Propria Persona

QUESTION PRESENTED

Whether interlocutory orders, issued by a district court sitting as a court of appeals in bankruptcy, are appealable.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 12

I. The Ninth Circuit exceeded it jurisdiction, and acted in violation of statutory and precedential limitations on its jurisdiction, in concluding that the interlocutory March 24, 2003, order, issued by the United States District Court for the District of Nevada sitting as a court of appeals in bankruptcy, was not appealable to the Ninth Circuit under 28 U.S.C. §1292(b) 12

II. Pursuant to Rule 10(c) of the Supreme Court Rules, this court should grant petitioner's writ of certiorari to the Ninth Circuit, because the Ninth Circuit's decisions manifestly conflict with this court's decision in *Germain, supra* . . 19

CONCLUSION 24

APPENDICES

Appendix A 1a

Appendix B 2a

Appendix C 4a

Appendix D 6a

TABLE OF AUTHORITIES

Page

CASES

Connecticut National Bank v. Germain,
503 U.S. 249, 112 S.Ct. 1146,
117 L.Ed.2d 391 (1992) . . 8-10, 13-15, 17-24

In re City of Desert Hot Springs,
339 F.3d 782 (9th Cir., Aug. 11, 2003),
cert. denied sub nom. Silver Sage Partners, Ltd. v. City of Desert Hot Springs,
2004 WL 46725 (Jan. 12, 2004) 23

In re Comora,
9 F.3d 1551 (9th Cir. 1993) 22

In re Mason,
709 F.2d 1313 (9th Cir. 1983) 20

In re Pizza of Hawaii, Inc.,
761 F.2d 1374 (9th Cir. 1985) 20, 23

In re S.S. Retail Stores,
162 F.3d 1230 (9th Cir. 1998) 8-9, 22

TABLE OF AUTHORITIES (CONT.)

Page

CASES (CONT.)

In re Vylene Enterprises, Inc.,
968 F.2d 887 (9th Cir. 1992) 21

King v. Stanton,
766 F.2d 1283 (9th Cir. 1985) 19

Matter of B.C. Enterprises, Ltd.,
82 F.3d 422 (9th Cir. 1996) 22

STATUTES AND RULES

Bankruptcy Code, Title 11 U.S.C., Chapter 7 13

Bankruptcy Code, Title 11 U.S.C., Chapter 11 .. 3, 13

11 U.S.C. §105 5

11 U.S.C. §523 ..... 4, 11, 25

28 U.S.C. §158 ..... 2, 6, 8-10, 14-16, 19-20, 22-24

28 U.S.C. §1254 ..... 2, 11

TABLE OF AUTHORITIES (CONT.)

Page

STATUTES AND RULES (CONT.)

28 U.S.C. §1291 ..... 2, 14-15, 22

28 U.S.C. §1292 ..... 2, 9-10, 12, 14-22, 24

B.R. 4007 ..... 4, 11, 25

S.C.R. 10 19

OTHER

Groucho Marx; Arthur Sheekman (Introduction), *The Groucho Letters: Letters from and to Groucho Marx* (New York: Simon and Schuster, 1967) 17

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OPINIONS BELOW

The December 17, 2003, Order of the Ninth Circuit is included in the Appendix as Appendix C. The June 16, 2003, Order of the three-judge panel of the

Ninth Circuit (comprised of Rymer, Thomas, and Silverman, Circuit Judges) is included in the Appendix as Appendix B. The March 24, 2003, Order of the United States District Court for the District of Nevada is included in the Appendix as Appendix A.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The full text of the following relevant statutory provisions is attached in the Appendix as Appendix D.

1. 28 U.S.C. §158(a)(1).

2. 28 U.S.C. §158(a)(3).

3. 28 U.S.C. §158(d).

4. 28 U.S.C. §1291.

5. 28 U.S.C. §1292(b).

STATEMENT OF THE CASE

On May 9, 2002, petitioner, John K. Ellis (hereinafter referred to as "Mr. Ellis"), the debtor, initially filed his voluntary petition under Chapter 11 of the Bankruptcy Code.

On May 9, 2002, the clerk of the bankruptcy court duly filed its "Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines," scheduling the initial meeting of creditors for 2:00 p.m. on June 10, 2002, at 300 Booth Street, Room 2110, Reno, Nevada, 89509. In so doing, the clerk inadvertently (and erroneously) noted that the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" was "09/09/02," instead of "08/09/02," sixty (60) days after the first date set for the meeting of creditors on June 10, 2002.

At 2:00 p.m. on June 10, 2002, the initial meeting of creditors was held at 300 Booth Street, Room 2110, Reno, Nevada, 89509, as scheduled.

At 11:00 a.m. on June 24, 2002, a continued meeting of creditors was held at 300 Booth Street, Room 2110, Reno, Nevada, 89509, as scheduled. Respondent, Robert B. Metz (hereinafter referred to as "Mr. Metz"), attended the continued meeting of creditors on June 24, 2002.

On September 9, 2002, Mr. Metz belatedly filed his complaint objecting to dischargeability of debt under 11 U.S.C. §§523(a)(4), (a)(6).

On September 30, 2002, Mr. Ellis filed his motion to dismiss Mr. Metz's complaint with prejudice, upon the grounds that: (1) the bankruptcy court lacked subject matter jurisdiction; and (2) the complaint failed to state a claim upon which relief could be granted, in that the complaint showed on its face that it was time barred by the explicit provisions of 11 U.S.C. §523(c) and Bankruptcy Rule 4007(c).

On November 5, 2002, the bankruptcy court (from the bench) orally granted Mr. Ellis's September 30, 2002, motion to dismiss and noted that Mr. Metz had failed to file his complaint within the requisite sixty (60) day period, as required by the explicit provisions of 11 U.S.C. §523(c) and Bankruptcy Rule 4007(c).

On November 6, 2002, the bankruptcy court reversed itself and entered its order correcting oral decision, noting that "the notice to creditors inadvertently set September 9, 2002 as the last date to file instead of 60 days from the first date set for the meeting of creditors as required by the Code"; and that "[t]his notice was error but having been made it is binding."

On November 15, 2002, Mr. Ellis filed his motion for reconsideration, arguing: (1) that under prevailing Ninth Circuit authority, in order to avail himself of the bankruptcy court clerk's inadvertent error, Mr. Metz first must demonstrate that he relied to his detriment upon the mistake of the bankruptcy court clerk; (2) that Mr. Metz had adduced no evidence whatsoever that he relied to his detriment upon the mistake of the bankruptcy court clerk; (3) that there was no presumption that Mr. Metz had relied to his detriment upon the mistake of the bankruptcy court clerk; and (4) that the power of the bankruptcy court, if any, to remedy inadvertent bankruptcy court clerk errors under 11 U.S.C. §105(a) was an extraordinary equitable power, and that in this case the bankruptcy court affirmatively should decline to exercise its equitable power to assist Mr. Metz, because Mr. Metz demonstrably had "unclean hands."

On January 7, 2003, the bankruptcy court orally denied reconsideration of its November 6, 2002, order and concluded that, even though Mr. Metz had failed to adduce any evidence whatsoever that he relied to his detriment upon the mistake of the bankruptcy court clerk, it, nevertheless, was misleading, and Mr. Metz "could have relied on it":

> "[THE COURT] I don't want this Court to, uh, mislead anyone, and <u>whether</u>

> he [Mr. Metz] relied on it [the mistake of the Bankruptcy Court Clerk] or not, it was, it was misleading. It was not the true date, and he could have relied on it. I don't know whether he did or not, but he could have. And it, it, whose fault is it? It's the fault of the Clerk, and, and I'm not going to be a party to terminate the right to file because we, uh, made the wrong date. Uh, the Motion for Reconsideration is denied, and you'll have to answer and come to issue on this case." (Emphasis added.)

On January 30, 2003, the bankruptcy court entered its order denying Mr. Ellis's motion for reconsideration.

On February 6, 2003, Mr. Ellis duly filed his notice of appeal, his statement of election, and his motion to the district court for leave to appeal interlocutory order, arguing that: (1) pursuant to 28 U.S.C. §158(a)(3), the district courts have the power, at their discretion, to grant or deny a party leave to appeal from an interlocutory decision of a bankruptcy court; (2) the criteria for granting leave to appeal from an interlocutory bankruptcy court order are if the order in question involves a controlling question of law as to which there is substantial ground for difference of opinion, and if immediate appeal may materially

advance the ultimate termination of the litigation; (3) the bankruptcy court's January 30, 2003, order involved a controlling question of law as to which there was substantial ground for difference of opinion; and (4) an immediate appeal would be outcome-dispositive, and would materially advance the ultimate termination of the litigation.

On March 4, 2003, Mr. Ellis supplemented his request for judicial notice, contained in his February 6, 2003, motion to the district court for leave to appeal interlocutory order, with the February 25, 2003, findings of fact, conclusions of law, and order entered by Alice A. Molasky-Arman, Commissioner of Insurance, State of Nevada, Department of Business and Industry, Division of Insurance, which permanently revoked Mr. Metz's bail agent license, fined Mr. Metz ten thousand dollars ($10,000.00), and recommended to Richard A. Gammick, Washoe County District Attorney, that Mr. Metz be prosecuted for his criminal misconduct.

On March 24, 2003, the United States District Court for the District of Nevada entered the order from which the instant appeal was taken, denying Mr. Ellis's February 6, 2003, motion and stating that "[t]he court is not persuaded that granting the interlocutory appeal is in the interest of judicial economy or will advance the ultimate termination of litigation." (See, Appendix A).

On April 1, 2003, Mr. Ellis duly filed his notice of appeal to the Ninth Circuit from the district court's March 24, 2003, order.

On June 16, 2003, a three-judge panel of the Ninth Circuit (comprised of Rymer, Thomas, and Silverman, Circuit Judges) peremptorily denied Mr. Ellis's appeal "for lack of jurisdiction":

> "A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. *See* 28 U.S.C. §158(d); [*In re S.S. Retail Stores*, 162 F.3d 1230, 1232] (an appeal of an interlocutory order of the bankruptcy court is not appealable). Consequently, this appeal is dismissed for lack of jurisdiction." (See, Appendix B).

On June 24, 2003, Mr. Ellis duly filed his petition for rehearing en banc from the Ninth Circuit's June 16, 2003, order, arguing, as follows:

> "The June 16, 2003, panel decision cites only 28 U.S.C. §158(d) and [*In re S.S. Retail Stores, supra*, 162 F.3d at 1232] (an appeal of an interlocutory order of the bankruptcy court is not appealable). This

> is problematic for the following two reasons: (1) Ever since the United States Supreme Court's decision in *Connecticut National Bank v. Germain*, 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992), appeals (such as this one) from interlocutory orders of the bankruptcy court are governed by 28 U.S.C. §1292(b), and not by 28 U.S.C. §158(d), *see, Connecticut National Bank, supra*, 503 U.S. at 252, 254, 112 S.Ct. at 1149-50 ('Section 158 (d) is silent as to review of interlocutory orders.'; 'The parties agree, as they must, that §158 did not confer jurisdiction on the Court of Appeals.'); and (2) [The Ninth Circuit's] decision in *In re S.S. Retail Stores, supra*, nowhere mentions the Supreme Court's decision in *Connecticut National Bank, supra* (and neither do any of the cases cited therein)."

On December 17, 2003, the same three-judge panel, "on behalf of the full court," denied Mr. Ellis's April 1, 2003, petition for rehearing en banc noting that "[t]he district court has not certified its interlocutory order for appeal pursuant to 28 U.S.C. §1292(b)." (See, Appendix C)(emphasis added).

The Ninth Circuit's December 17, 2003, order is in excess of its jurisdiction, and in violation of statutory and precedential limitations on its jurisdiction, in that the interlocutory March 24, 2003, order, issued by the district court sitting as a court of appeals in bankruptcy, clearly is appealable to the Ninth Circuit under the unambiguous language of 28 U.S.C. §1292, as concluded by this court over eleven (11) years ago in *Germain, supra*, 503 U.S. at 254, 112 S.Ct. at 1150 ("There is no reason to infer from either [28 U.S.C.] §1292 or §158(d) that Congress meant to limit appellate review of interlocutory orders in bankruptcy proceedings. So long as a party to a proceeding or case in bankruptcy meets the conditions imposed by §1292, a court of appeals may rely on that statute as a basis for jurisdiction."), and yet the Ninth Circuit anomalously concluded that it "lacks jurisdiction over this appeal," because "[t]he district court has not certified its interlocutory order for appeal pursuant to 28 U.S.C. §1292(b)." (See, Appendix C).

Mr. Ellis has exhausted all available remedies required to be pursued by him, in that on April 1, 2003, Mr. Ellis duly filed his notice of appeal to the Ninth Circuit from the district court's March 24, 2003, order; and on June 24, 2003, Mr. Ellis duly filed his petition for rehearing en banc from the three-judge panel's June 16, 2003, order.

Mr. Ellis has no right of appeal from the Ninth Circuit's December 17, 2003, order, nor a plain, speedy, and adequate remedy other than the relief sought in this petition.

Certiorari is the only method available to obtain review of the Ninth Circuit's December 17, 2003, order, if only because the Ninth Circuit's December 17, 2003, order itself explicitly provides that "[n]o further motions for reconsideration, rehearing, modification, clarification, stay of the mandate or any other submissions shall be filed or entertained in this closed docket." (See, Appendix C).

If the Ninth Circuit's December 17, 2003, order is not annulled, Mr. Ellis will be irreparably injured, in that Mr. Ellis will be required to defend the frivolous adversary proceeding filed by Mr. Metz in the bankruptcy court, notwithstanding the fact that Mr. Metz failed to file his complaint within the requisite sixty (60) day period, as required by the explicit provisions of 11 U.S.C. §523(c) and Bankruptcy Rule 4007(c).

All parties appear in the caption of the case on the cover page.

The opinion of the Ninth Circuit is unpublished.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT EXCEEDED ITS JURISDICTION, AND ACTED IN VIOLATION OF STATUTORY AND PRECEDENTIAL LIMITATIONS ON ITS JURISDICTION, IN CONCLUDING THAT THE INTERLOCUTORY MARCH 24, 2003, ORDER, ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA SITTING AS A COURT OF APPEALS IN BANKRUPTCY, WAS NOT APPEALABLE TO THE NINTH CIRCUIT UNDER 28 U.S.C.§1292(b).

28 U.S.C. §1292(b) provides in relevant portion:

> "(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its

> discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order;..."

In *Germain, supra*, this court determined the appealability of an interlocutory order issued by a district court sitting as a court of appeals in bankruptcy. In that case, O'Sullivan's Fuel Oil Co., Inc. ("O'Sullivan"), filed a bankruptcy petition in the United States Bankruptcy Court for the District of Connecticut. Although the case began as a reorganization under Chapter 11 of the Bankruptcy Code, the bankruptcy court converted it into a liquidation under Chapter 7. Petitioner Connecticut National Bank ("CNB") was a successor in interest to one of O'Sullivan's creditors. Respondent Thomas M. Germain ("Germain") was trustee of O'Sullivan's estate. Germain sued CNB in Connecticut state court, seeking to hold the bank liable for various torts and breaches of contract. CNB removed the suit to the United States District Court for the District of Connecticut, which, pursuant to local rule, automatically referred the proceeding to the bankruptcy court overseeing the liquidation. Germain then filed a demand for a jury trial. CNB moved to strike Germain's demand. The bankruptcy court denied CNB's motion, and the district court affirmed. CNB then tried to appeal to the Court of Appeals for the Second Circuit, but the court dismissed for lack of

jurisdiction. The Second Circuit held that a court of appeals may exercise jurisdiction over interlocutory order in bankruptcy only when a district court issues the order after having withdrawn a proceeding or case from bankruptcy court, and not when the district court acts in its capacity as a bankruptcy court of appeals. This court granted certiorari, and then reversed and remanded. 503 U.S. at 250-51, 112 S.Ct. at 1148.

In *Germain, supra*, this court noted that courts of appeals have jurisdiction over "[i]nterlocutory orders of the district courts of the United States" under 28 U.S.C. §1292. CNB contended that Section 1292(b) applied by its terms, and that the Second Circuit, therefore, could have exercised discretionary jurisdiction over its appeal. Germain argued that Section 1292 did not apply at all because Congress limited Section 1292 through 28 U.S.C. §158(d), which deals with bankruptcy jurisdiction. CNB responded that nothing in Section 158(d) limited Section 1292. This court agreed with CNB:

> "Contrary to Germain's contention, we need not choose between giving effect on the one hand to §1291 and on the other to §158(d), for the statutes do not pose an either-or proposition. Section 1291 confers jurisdiction over appeals from 'final decisions of the district courts' acting in

> any capacity. Section 158(d), in contrast, confers jurisdiction over appeals from final decisions of the district courts when they act as bankruptcy appellate courts under §158(a), and also confers jurisdiction over final decisions of the appellate panels in bankruptcy acting under §158(b). Sections 1291 and 158(d) do overlap, therefore, but each section confers jurisdiction over cases that the other section does not reach." 503 U.S. at 253, 112 S.Ct. at 1149.

In *Germain, supra*, this court pointed out that 28 U.S.C. §158(d) did not confer jurisdiction on courts of appeals to review interlocutory orders issued by district courts sitting as courts of appeals in bankruptcy:

> "Neither [28 U.S.C. §158(d)] nor any other part of §158 mentions interlocutory orders entered by the district courts in bankruptcy. The parties agree, as they must, that §158 did not confer jurisdiction on the Court of Appeals." 503 U.S. at 252, 112 S.Ct. at 1149.

In *Germain, supra*, this court concluded that appeals (such as this one) from interlocutory orders, issued by a district court sitting as a court of appeals in bankruptcy, are governed by 28 U.S.C. §1292(b):

> "[W]e think that judicial inquiry into the applicability of §1292 begins and ends with what §1292 does say and with what §158(d) does not. Section 1292 provides for review in the courts of appeals, in certain circumstances, of '[i]nterlocutory orders of the district courts of the United States.' Section 158(d) is silent as to review of interlocutory orders. Nowhere does §1292 limit review to orders issued by district courts sitting as trial courts in bankruptcy rather than appellate courts, and nowhere else, whether in §158(d) or any other statute, has Congress indicated that the unadorned words of §1292 are in some way limited by implication...There is no reason to infer from either §1292 or §158(d) that Congress meant to limit appellate review of interlocutory orders in bankruptcy proceedings. So long as a party to a proceeding or case in bankruptcy meets the conditions imposed by §1292, a court of appeals may rely on that statute as a basis for jurisdiction." 503 U.S. at 254, 112 S.Ct. at 1149-50.

In the present case, the three-judge panel initially rested its decision solely upon the inapposite provisions of 28 U.S.C. §158(d). (See, Appendix B). Later, the

same three-judge panel, speaking "on behalf of the full court," correctly cited the provisions of 28 U.S.C. §1292(b), but without any discussion, and without mention of this court's seminal decision in *Germain, supra*, contented itself with the cryptic observation that "[t]he district court has not certified its interlocutory order for appeal pursuant to 28 U.S.C. §1292(b)." (See, Appendix C).

The Ninth Circuit's insistence that the district court, sitting as a court of appeals in bankruptcy, must first "certif[y] its interlocutory order for appeal" before the Ninth Circuit may exercise its jurisdiction, is tantamount to a conclusion by the Ninth Circuit that appeals (such as this one) from interlocutory orders, issued by a district court sitting as a court of appeals in bankruptcy, are never appealable. With all due respect, the Ninth Circuit is mistaken;[1] indeed, the most obvious

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[1] The Ninth Circuit's insistence that the district court, sitting as a court of appeals in bankruptcy, must first "certif[y] its interlocutory order for appeal" before the Ninth Circuit may exercise its jurisdiction, is vaguely reminiscent of Groucho Marx's famous one-liner, that he "would never belong to any club that would have [him] as a member." *See*, Groucho Marx; Arthur Sheekman (Introduction), *The Groucho Letters: Letters from and to Groucho Marx* (New York: Simon and Schuster, 1967)(Letter to Hollywood's Friar's Club: "Please accept my resignation. I don't care to belong to any club that will have me as a member.") Obviously, if the district court had granted Mr.

counterexample is provided by this court's decision in *Germain, supra.*

It should be noted carefully that in *Germain, supra*, the district court at no time "certified its interlocutory order for appeal" to the court of appeals;[2] nevertheless, this court entertained CNB's appeal and concluded that, "[s]o long as a party to a proceeding or case in bankruptcy meets the conditions imposed by [28 U.S.C.] §1292, a court of appeals may rely on that

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Ellis's February 6, 2003, motion for leave to appeal interlocutory order (App. 57-93), then Mr. Ellis's April 1, 2003, notice of appeal (App. 106-09) to the Ninth Circuit would not have been necessary, in the first instance.

2 In *Germain, supra*, Germain filed a demand for a jury trial, and CNB moved to strike Germain's jury trial demand. The bankruptcy court denied CNB's motion, and the district court affirmed the bankruptcy court's denial of CNB's motion to strike. CNB then tried to appeal to the court of appeals, but the court dismissed for lack of jurisdiction, holding that a court of appeals may exercise jurisdiction over interlocutory orders in bankruptcy only when a district court issues the order after having withdrawn a proceeding or case from a bankruptcy court, and not when the district court acts in its capacity as a bankruptcy court of appeals. This court disagreed and granted certiorari. 503 U.S. at 250-51, 112 S.Ct. at 1148.

statute as a basis for jurisdiction." 503 U.S. at 254, 112 S.Ct. at 1150.

Therefore, notwithstanding the Ninth Circuit's cryptic observation in the instant case, that "[t]he district court has not certified its interlocutory order for appeal pursuant to 28 U.S.C. §1292(b)", the interlocutory March 24, 2003, order, issued by the district court sitting as a court of appeals in bankruptcy, clearly is appealable to the Ninth Circuit under the unambiguous language of 28 U.S.C. §1292, as concluded by this court over eleven (11) years ago in *Germain, supra*, 503 U.S. at 254, 112 S.Ct. at 1150.

II. PURSUANT TO RULE 10(c) OF THE SUPREME COURT RULES, THIS COURT SHOULD GRANT PETITIONER'S WRIT OF CERTIORARI TO THE NINTH CIRCUIT, BECAUSE THE NINTH CIRCUIT'S DECISIONS MANIFESTLY CONFLICT WITH THIS COURT'S DECISION IN *GERMAIN, SUPRA*.

Prior to this court's decision in *Germain, supra*, the Ninth Circuit generally concluded that courts of appeals do not have jurisdiction to hear interlocutory appeals in bankruptcy cases.

For example, in *King v. Stanton*, 766 F.2d 1283 (9th Cir. 1985), the Ninth Circuit concluded that "[28

U.S.C. §158] permits interlocutory orders to be appealed to district courts," but that "such orders are not appealable to [the courts of appeals]." 766 F.2d at 1285 n. 5, *citing, In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1378 (9th Cir. 1985); *In re Mason*, 709 F.2d 1313, 1315 (9th Cir. 1983).

Similarly, in *In re Pizza of Hawaii, Inc., supra*, the Ninth Circuit concluded that interlocutory orders "may be reviewed at the discretion of the district courts, 28 U.S.C. §158(a), but they are not appealable to the court of appeals under 28 U.S.C. §158(d)."[3] 761 F.2d at 1378 (emphasis added).

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This certainly is true; however, as noted by this court in *Germain, supra*, interlocutory orders clearly are appealable to the Ninth Circuit under the unambiguous language of 28 U.S.C. §1292. 503 U.S. at 254, 112 S.Ct. at 1149-50 ("But we think that judicial inquiry into the applicability of §1292 begins and ends with what §1292 does say and with what §158(d) does not. Section 1292 provides for review in the courts of appeals, in certain circumstances, of '[i]nterlocutory orders of the district courts of the United States.' Section 158(d) is silent as to review of interlocutory orders. Nowhere does §1292 limit review to orders issued by district courts sitting as trial courts in bankruptcy rather than appellate courts, and nowhere else, whether in §158(d) or any other statute, has Congress indicated that the unadorned words of §1292 are in some way limited by implication.").

Likewise, in *In re Mason, supra*, the Ninth Circuit concluded that interlocutory orders "may be reviewed at the discretion of the district courts," but "they are not appealable to the courts of appeals." 709 F.2d at 1315.

On March 9, 1992, this court held in *Germain, supra*, that an interlocutory order issued by a district court sitting as court of appeals in bankruptcy is appealable under the unambiguous language of 28 U.S.C. §1292. 503 U.S. at 254, 112 S.Ct. at 1150.

Approximately three and one-half (3½) months later, on June 29, 1992, in *In re Vylene Enterprises, Inc.*, 968 F.2d 887 (9th Cir. 1992), the Ninth Circuit acknowledged this court's decision in *Germain, supra*, but continued to refuse to hear interlocutory orders of the district court sitting as a bankruptcy appellate court:

> "Interlocutory orders of the district court, sitting as a bankruptcy trial or bankruptcy appellate court, are reviewable by the court of appeals in limited circumstances. [*Germain, supra*]. The district court's order vacating the bankruptcy court's judgment favorable to Vylene does not state that it resolved 'a controlling question of law,' the immediate appeal of which 'may materially advance the ultimate termination of the litigation.'

> 1292(b);... We do not have jurisdiction under §1292(b)." 968 F.2d at 890 (emphasis added).

Since that time, the Ninth Circuit has continued to refuse to hear interlocutory appeals in bankruptcy cases. *See, Matter of B.C. Enterprises, Ltd.*, 82 F.3d 422, at 6 n. 3 (9th Cir. 1996)(unpublished decision)("An interlocutory order from the District Court sitting as a Court of Appeals in Bankruptcy may be appealed to the Court of Appeals under certain circumstances pursuant to 28 U.S.C. §1292. [*Germain, supra*]. This exception does not apply in this appeal because the District Court did not state in writing 'that [such] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.' 28 U.S.C. 1291(b) [*sic*]."")(emphasis added); *In re Comora*, 9 F.3d 1551, at 1 (9th Cir. 1993)(unpublished decision)("The district court dismissed Comora's appeal. It did not certify that the case involves a 'controlling question of law...and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.' 28 U.S.C. §1292(b).")(emphasis added).

In *In re S.S. Retail Stores, supra*, the Ninth Circuit concluded, contrary to this court's decision in

Germain, supra, that "[t]his court has jurisdiction to hear appeals from 'all final decisions, judgments, orders, and decrees' entered by a district court...on appeal from a bankruptcy court. 28 U.S.C. §158(d)"; but that "[t]his court, however, does not have discretion to hear interlocutory appeals." 162 F.3d at 1232, *citing, King, supra*, 766 F.2d at 1285 n. 5; *In re Pizza of Hawaii, Inc., supra*, 761 F.2d at 1378.

Recently, in *In re City of Desert Hot Springs*, 339 F.3d 782 (9th Cir., Aug. 11, 2003), *cert. denied sub nom. Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 2004 WL 46725 (Jan. 12, 2004), the Ninth Circuit concluded, contrary to this court's decision in *Germain, supra*, that courts of appeals do not have jurisdiction to hear interlocutory appeals in bankruptcy cases:

> "The courts of appeals do not have jurisdiction to hear interlocutory appeals in bankruptcy cases. Whether we have jurisdiction therefore depends upon the nature of the bankruptcy court's order denying [a creditor's] motion to dismiss. Parties may appeal decisions of a bankruptcy court to either the district court or to the BAP. 28 U.S.C. §158(a-b). The district court or BAP must hear appeals from final decisions of the bankruptcy

> courts. So must we. It is within the discretion of the district court and the BAP, however, to hear interlocutory appeals. *Id.* at 158(a). We have no jurisdiction to consider whether such exercises of discretion are proper. The courts of appeals only have jurisdiction to review the 'final decisions, judgments, orders and decrees' entered by the BAP or district courts. *Id.* at §158(d)." 339 F.3d at 787-88 (emphasis added).

Thus, even after this court's decision in *Germain, supra*, the Ninth Circuit has continued to refuse to hear interlocutory appeals in bankruptcy cases. Plainly, this court's intervention by way of writ petition is required in order to secure and maintain the uniformity of this court's decision in *Germain, supra*.

CONCLUSION

In the present case, the interlocutory March 24, 2003, order issued by the district court sitting as a court of appeals in bankruptcy, is appealable under the unambiguous language of 28 U.S.C. §1292; therefore, the Ninth Circuit's December 17, 2003, order conflicts with this court's decision in *Germain, supra*.

Accordingly, Mr. Ellis respectfully requests that this court issue a writ of certiorari directing the Ninth Circuit to certify to this court, at a time and place then or thereafter specified by court order, a transcript of the record and proceedings of the matter above described, and to desist from any further action or proceedings in connection with or based on the order to be reviewed.

Despite the workload of this honorable court, this petition for writ of certiorari is Mr. Ellis's only means of reviewing effectively the Ninth Circuit's December 17, 2003, order. An appeal after Mr. Ellis has incurred the substantial cost and expense of defending the frivolous adversary proceeding filed by Mr. Metz in the bankruptcy court, notwithstanding the fact that Mr. Metz failed to file his complaint within the requisite sixty (60) day period, as required by the explicit provisions of 11 U.S.C. §523(c) and Bankruptcy Rule 4007(c), would be meaningless.

Respectfully submitted,

John K. Ellis
5431 Morning Star Drive
Reno, Nevada 89523
(775) 746-3637
In Propria Persona

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CV-N-03-0102-HDM (VPC)

IN RE:

JOHN K. ELLIS, an individual,

Debtor.

Filed March 24, 2003

The motion of John Ellis for leave to appeal the interlocutory order of the Bankruptcy Court entered January 30, 2003 is denied. The court is not persuaded that granting the interlocutory appeal is in the interest of judicial economy or will advance the ultimate termination of litigation. Therefore, the motion...is denied.

It is so ORDERED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 03-15593

In re: JOHN K. ELLIS,

Debtor.

ROBERT B. METZ,

Plaintiff,

v.

AMERICAN LIBERTY INVESTMENTS INC., et al.,

Defendants.

JOHN K. ELLIS,

Appellant,

v.

ROBERT B. METZ,

Appellee.

Before: RYMER, THOMAS and SILVERMAN, Circuit Judges

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. *See* 28 U.S.C. §158(d); *In re S. S. Retail Stores*, 162 F.3d 1230, 1232 (9th Cir. 1998)(an appeal of an interlocutory order of the bankruptcy court is not appealable).

Consequently, this appeal is dismissed for lack of jurisdiction.

All pending motions are denied as moot.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 03-15593

In re: JOHN K. ELLIS,

Debtor.

ROBERT B. METZ,

Plaintiff,

v.

AMERICAN LIBERTY INVESTMENTS INC., et al.,

Defendants.

JOHN K. ELLIS,

Appellant,

v.

ROBERT B. METZ,

Appellee.

Before: RYMER, THOMAS and SILVERMAN, Circuit Judges

Appellant's petition for rehearing en banc, construed as a motion for reconsideration en banc of this court's June 16, 2003 order dismissing this appeal for lack of jurisdiction, is denied on behalf of the full court. *See* Gen. Ord. 6.11. The district court has not certified its interlocutory order for appeal pursuant to 28 U.S.C. §1292(b).

No further motions for reconsideration, rehearing, modification, clarification, stay of the mandate or any other submissions shall be filed or entertained in this closed docket.

APPENDIX D

28 U.S.C. §158

Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

...

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title...

...

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. §1291

Final decisions of district courts

The courts of appeals...shall have jurisdiction of appeals from all final decisions of the district courts of the United States,...except where a direct review may be had in the Supreme Court....

28 U.S.C. §1292(b)

Interlocutory decisions

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opnion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order,...